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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MIKE BOZIN, Plaintiff and Appellant, v. AT&T WIRELESS SERVICES, INC., et al., Defendants and Respondents.	B151508 (Super. Ct. No. BC235793)

APPEAL from a judgment of the Superior Court of Los Angeles County, David A. Horowitz, Judge. Affirmed in part, reversed in part and remanded.

Martin & McCormick, John D. Martin and Kathy J. McCormick for Plaintiff and Appellant.

Bingham McCutchen, McCutchen, Doyle, Brown & Enersen, Debra L. Fischer and Heather C. Beatty for Defendants and Respondents.

Plaintiff Mike Bozin appeals from the judgment of dismissal entered after the trial court sustained without leave to amend a demurrer to his first amended complaint and denied his motion for reconsideration. Bozin contends that his proposed second amended complaint, attached to his motion for reconsideration, adequately demonstrates his claims

for wrongful termination, defamation and intentional and negligent infliction of emotional distress can be amended to state viable causes of action. Based on this proposed pleading, we reverse the judgment in part and remand the matter to the trial court with directions to permit Bozin to file a second amended complaint.

FACTUAL AND PROCEDURAL BACKGROUND

According to the facts alleged in the first amended complaint,[1] Bozin was employed in 1992 as a field engineer technician at AT&T Wireless Services (AT&T Wireless). On February 17, 2000 Bozin was terminated based on allegations made by his coworker Nancy Lyman that he engaged in inappropriate sexual conduct toward her. Bozin denied the allegations.

After his termination, Bozin sued AT&T Wireless, its human resources manager Josephine Wittenberg, his supervisor Barry Locke and Lyman (collectively, defendants) for wrongful termination, defamation, invasion of privacy and intentional and negligent infliction of emotional distress. Bozin sought compensatory and punitive damages.

The defendants demurred to the first amended complaint, arguing that Bozin had failed to state a claim as to each of his causes of action and, additionally, the causes of action for intentional and negligent infliction of emotional distress were preempted by workers' compensation exclusivity. Bozin did not file an opposition to the demurrer or appear at the hearing. The trial court sustained the demurrer without leave to amend, finding Bozin had failed to present any facts or argument to show he could cure the defects in the first amended complaint.[2]

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[1] Bozin voluntarily amended his original complaint before the hearing on a prior demurrer and motion to strike filed by the defendants.

[2] Although the notice of demurrer and demurrer did not request that the trial court deny Bozin leave to amend, the legal memorandum filed in support of defendants' demurrer asserted that the pleading's defects could not be cured by amendment.

Bozin then filed a motion for reconsideration under Code of Civil Procedure section 1008,[3] which attached a proposed second amended complaint. He argued the proposed second amended complaint differed from the first amended complaint in several significant respects: (1) as to the wrongful termination cause of action, the second amended complaint added the allegation that an implied contract existed between Bozin and AT&T Wireless and AT&T Wireless breached that contract by terminating Bozin without conducting a reasonable investigation into Lyman's accusations; (2) as to the defamation cause of action, the second amended complaint added the allegation that the charges made by Lyman to AT&T Wireless personnel regarding Bozin's supposed misconduct were knowingly false and thus actionable; and (3) as to the intentional and negligent infliction of emotional distress causes of action, the second amended complaint clarified that the allegations were premised on Lyman's conduct.[4]

The trial court denied the motion for reconsideration, finding Bozin had not satisfied section 1008 because he had simply revised the "same basic allegations" in the proposed second amended complaint and had not presented any new or different "facts" not known to him previously. The trial court entered a judgment of dismissal. Bozin filed a timely notice of appeal.

CONTENTIONS

Bozin contends the allegations in his proposed second amended complaint are sufficient to entitle him to leave to file an amended complaint on the theories of wrongful termination, defamation and intentional and negligent infliction of emotional distress.

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[4] The proposed second amended complaint dismissed Wittenberg and Locke as individual defendants as to all causes of action, eliminated Lyman as a defendant in the wrongful termination cause of action and deleted the cause of action for invasion of privacy.

DISCUSSION

1. Standard for Determining Whether a Plaintiff Is Entitled to Leave to Amend.

Bozin appeals from the judgment of dismissal, which encompasses both the order sustaining the demurrer to the first amended complaint without leave to amend and the order denying reconsideration. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 129 [appeal from judgment brings before appellate court all intermediate judicial rulings].) The sole issue we need decide is whether Bozin has demonstrated a "reasonable possibility" that he can amend any of his claims to state viable causes of action.[5] "When any court makes an order sustaining a demurrer without leave to amend[,] the question whether or not such court abused its discretion in making such an order is open in appeal *even though no request to amend such pleading was made*." (§ 472c, subd. (a), italics added.)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]"' [Citations.] This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citations], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend.

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5 Because the issue whether Bozin can demonstrate a reasonable possibility of amending his pleading to state a cause of action is necessarily before us on appeal, the propriety of the trial court's ruling on Bozin's motion for reconsideration is beside the point, notwithstanding the parties' focus on that question. Since section 472c, subdivision (a), makes it inevitable that the issue of the plaintiff's ability to amend the complaint will be presented to the Court of Appeal following an order sustaining a demurrer without leave to amend, however, we suggest that a more liberal construction of section 1008's requirements for "new and different facts" than utilized here would promote judicial economy by allowing the trial court to determine in the first instance whether the plaintiff has demonstrated the requisite "reasonable possibility" of successfully amending the pleading. (See generally *Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304 [119 Cal.Rptr.2d 614] [notwithstanding language of section 1008 trial courts retain their inherent power to reconsider interim rulings]; *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156.)

[Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) We determine whether the plaintiff has shown "in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

2. Cause of Action for Wrongful Termination.

In support of its demurrer to the wrongful termination cause of action in the first amended complaint, AT&T Wireless argued Bozin had failed to allege "facts sufficient to establish any legal exception to at-will employment." The proposed second amended complaint now alleges, "Plaintiff was employed by AT&T for almost eight years and, as set forth herein, received, *inter alia*, favorable employment evaluations, merit raises, and received praise for the work performed for AT&T. Based upon said facts an implied contract arose that Plaintiff would not be terminated absent good cause to do so. Further, based upon the oral representations and conduct of Defendant, as set forth above, Plaintiffs [*sic*] had an employment contract with Defendant that he would be employed by Defendant so long as his employment was satisfactory, and that Defendant would not discharge him but for good and just cause." The proposed wrongful termination cause of action also alleges that "[i]n light of the implied contract alleged herein, AT&T had a duty to Plaintiff, that in the event allegations were made such as those by Lyman described herein, AT&T would conduct a reasonable investigation to assure that the allegations made were true before taking any adverse action with respect to Plaintiff's employment."

By proposing to add allegations that he and AT&T Wireless had an implied-in-fact contract, based on certain conduct and statements, and that his termination was wrongful because it was in breach of that contract, Bozin has demonstrated a reasonable possibility that he can state a cause of action for wrongful termination against AT&T Wireless.[6] (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 336-337 ["One example of a

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6 Bozin's proposed allegations on the wrongful termination cause of action relate to AT&T Wireless only.

contractual departure from at-will status is an agreement that the employee will be terminated only for 'good cause' [citation] in the sense of '"'a fair and honest cause or reason, regulated by good faith . . .'" [citation], as opposed to one that is "trivial, capricious, unrelated to business needs or goals, or pretextual . . . ." [Citations.]' [¶] . . . [¶] Thus, the employer and employee may enter '"an agreement . . . that . . . the employment relationship will continue indefinitely, pending the occurrence of *some event such as* the employer's dissatisfaction with the employee's services or the existence of some 'cause' for termination."' [¶] . . . [¶] The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations. [¶] . . . [¶] '[T]he totality of the circumstances' must be examined to determine whether the parties' conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer's termination rights"].)

3. Cause of Action for Defamation.

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage. [Citations.] Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the public or a large group; communication to a single individual is sufficient. [Citations.]" (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1179.)

Bozin proposes to allege that: (1) Lyman falsely represented to AT&T Wireless employees that he "had [engaged in] certain acts which, if true, could constitute acts of sexual harassment"; (2) the "statements were false and were made by Lyman with knowledge of their falsity"; (3) "Lyman made these statements to [AT&T Wireless's] employees in its Human Resources Department with the knowledge, desire, and intent that the representations would be repeated to Josephine Wittenberg and Barry Locke, those individuals at [AT&T Wireless] charged with determination whether [Bozin]

should be terminated"; (4) the statements are slanderous per se and, additionally, caused him injury and actual damage; and (5) AT&T Wireless ratified Lyman's conduct.

The proposed allegations, unlike those in the first amended complaint, focus on the allegedly false statements made by Lyman as the basis for the defamation claim and present a reasonable possibility that Bozin can state a cause of action for defamation against Lyman. As to AT&T Wireless, however, Bozin alleges only that it terminated him without an adequate investigation and "by its conduct," the nature of which is unspecified, ratified Lyman's actions. Those allegations are on their face insufficient to defeat AT&T Wireless's qualified privilege under Civil Code section 47, subdivision (c), to make otherwise defamatory statements in the court of an investigation of sexual harassment complaints. (See *Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [malice cannot be inferred from employer's failure to do a better job of investigating sexual harassment complaint].)

4. Causes of Action for Intentional and Negligent Infliction of Emotional Distress.

"The elements of a prima facie case of intentional infliction of emotional distress consist of: (1) extreme and outrageous conduct by the defendant with the intent to cause, or reckless disregard for the probability of causing, emotional distress; (2) suffering of severe or extreme emotional distress by the plaintiff; and (3) the plaintiff's emotional distress is actually and proximately the result of defendant's outrageous conduct. [Citation.]" (*Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1133.) "Recovery for negligent infliction of emotional distress is possible where the defendant owes the plaintiff a direct duty and the plaintiff suffers emotional distress, even where there is no accompanying physical injury. [Citation.]" (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 119.)

Here, it is reasonably possible Bozin can state a cause of action for intentional infliction of emotional distress against Lyman based on his proposed allegations that she made false accusations of sexual misconduct against him that were designed and intended to, and did, cause him humiliation, mental anguish and emotional and physical distress. However, nothing in the proposed second amended complaint would establish any legally

cognizable duty owed by Lyman to Bozin, an essential element of the negligent infliction cause of action. (*Jacoves v. United Merchandising Corp.*, *supra*, 9 Cal.App.4th at p. 119.) As to AT&T Wireless, the same privilege that defeats Bozin's attempt to allege a cause of action for defamation precludes his purported causes of action for intentional and negligent infliction of emotional distress. (*Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849 [applying Civil Code section 47 privilege to cause of action for intentional infliction of emotion distress]; see generally *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1184-1185 [no independent fraud claim arises from a misrepresentation aimed at termination of employment].)

Bozin's amended cause of action for intentional infliction of emotional distress, moreover, may be based *only* on Lyman's supposedly false accusations and not on Bozin's allegedly wrongful termination. As a general rule, "[t]he emotional distress which stems from an employer's unfavorable supervisory decisions, including termination of employment, is a normal part of the employment relationship, even when the distress results from an employer's conduct that is intentional, unfair or outrageous. Thus, the employee is left to his workers' compensation remedy. [Citations.]" (*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 577.) A plaintiff can recover for infliction of emotional distress only when "he or she has a tort cause of action for wrongful termination in violation of public policy or wrongful termination in violation of an express statute . . . ." (*Ibid*.) Bozin's proposed allegations on his wrongful termination cause of action are based on breach of an implied-in-fact contract only, not on the violation of any public policy or statute. Thus, there is no reasonable possibility he can amend his complaint to state a cause of action for emotional distress based on his allegedly wrongful termination that is not preempted by workers' compensation exclusivity.

DISPOSITION

The judgment as to defendants AT&T Wireless and Nancy Lyman is reversed. On remand, the trial court is directed to vacate its order denying plaintiff Mike Bozin leave to amend, to enter a new and different order granting Bozin leave to file a second amended

complaint on the wrongful termination cause of action as to AT&T Wireless only and on the defamation and intentional infliction of emotional distress causes of action as to Lyman only, and to conduct further proceedings not inconsistent with this opinion. The judgment is affirmed as to defendants Josephine Wittenberg and Barry Locke. The parties shall bear their own costs on appeal.

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PERLUSS, J.

We concur:

LILLIE, P. J.

JOHNSON, J.